# Malaysian Assurance Alliance Bhd v Maju Holdings Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–430 OF 2003
KANG HWEE GEE J
8 JULY 2008

*Contract — Guarantee — Guarantee for loan facility — Validity — Whether loan granted by plaintiff contravened s 50(1) and (4) of the Insurance Act 1996 ('the Act') — Whether guarantees by defendants who were not 'prescribed persons' under s 50(4) of the Act invalid — Whether guarantee contracts void under s 24(a) and (b) of the Contracts Act 1950 — Insurance Act 1996 s 50(1) & (4) — Contracts Act 1950 s 24*

*Contract — Illegality — Contravention of law — Whether guarantees by defendants who were not 'prescribed persons' under s 50(4) of the Insurance Act 1996 invalid and therefore illegal*

*Statutory Interpretation — Construction of statutes — Purposive approach — Purpose of enacting s 50 of the Insurance Act 1996*

The plaintiff being a licensed insurance company was governed and regulated by the Insurance Act 1996 ('the Act'). The plaintiff had granted a RM20m loan to ASM Development ('the borrower'), which was not a party to this suit, and the securities given by the borrower were two first party legal charges over two pieces of land with the alleged open market value of RM28.707m. Additionally there were two guarantees provided by the first and second defendants, a corporate guarantee and a personal guarantee. Two directors of the first defendant had executed the corporate guarantee while the second defendant in his personal capacity had executed the personal guarantee. The defendants' defence was that the loan granted by the plaintiff contravened s 50(1) and (4) of the Act because there was no approval from Bank Negara for the plaintiff to grant the loan and in addition the security taken from the borrower was inadequate. The defendants disputed the validity of the respective guarantees on the grounds that as they were not 'prescribed persons' under s 50(4) of the Act, the guarantees by themselves were therefore invalid. The defendants further submitted that the guarantees being contracts were void under s 24(a) and (b) of the Contracts Act 1950 ('CA'), being contracts that were forbidden by law or contracts of such a nature that, if

A permitted, would defeat any law. The plaintiff, on the other hand, submitted that the purpose of s 50 of the Act is to increase the margin of solvency of the insurer in order to afford greater protection of the insured and that it is clear that under s 50 of the Act, the insurer does not need specific approval from Bank Negara in respect of each loan it gives out provided the loan is B fully guaranteed or secured. Thus the guarantees taken by the plaintiff in this case were additional to the immovable property already taken as security from the borrower. As such, the plaintiff submitted that the guarantees that were taken by the plaintiff were not subject to s 50 of the Act and since they were not prohibited under the Act there was no question of them being illegal C under s 24 of the CA.

**Held**, granting judgment to the plaintiff:

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(1) Section 50 of the Act is silent on the civil rights and obligations of parties with respect to contracts entered into in contravention of this provision. It merely prohibits licensed insurers from giving out loans which are not fully guaranteed by prescribed persons. As such the E dispute in this proceeding could be resolved by determining whether the personal letter of guarantee and indemnity when tested under s 24 of the CA were: (a) forbidden by statute; (b) of such a nature that they would be defeated under any law; or (e) regarded as immoral or opposed to public policy by the court (see paras 22–23).

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(2) The purpose of s 50 of the Act is, 'to regulate the insurance companies to make sure that the policyholders' funds are secure because the insurers deal with public funds and therefore the legislation imposes restrictions on the investment uses of the funds'. It was plain that even G the credit facility that the plaintiff insurance company gave out, which was not guaranteed by a prescribed person, may fall outside that category of statutes prohibited by statute to render it void under s 24(1) of the CA. Section 50 is not meant to regulate the guarantor who on the contrary would be protecting the policyholders' fund by the guarantee H that he provides. The guarantee that the defendants provide was distinct from the other contract granting the loan to the company. It emanated from a different consideration in that it was given to 'unconditionally guarantee the repayment' of all sums of money which were owing. Thus even if the contract on the loan itself was void or unenforceable, the I guarantee could stand on its own for its validity did not depend on the unenforceability of the loan but on the disbursement that the plaintiff had already made to the principal debtor (see paras 28–30).

(3) Neither the consideration nor the object of the guarantee was of such a nature that it would defeat s 50; nor could it be immoral or opposed

to public policy. Its consideration and object was noble for it provided an insurance of last resort for the recovery of the loan (see para 31).

**[Bahasa Malaysia summary**

Plaintif adalah syarikat insurans berlesen yang dikuasai dan dikawal oleh Akta Insurans 1996 ('Akta'). Plaintif telah memberikan pinjaman RM20j kepada ASM Development ('peminjam'), yang bukan pihak kepada guaman ini, dan cagaran-cagaran yang diberikan oleh peminjam adalah dua gadaian sah pihak pertama ke atas dua bidang tanah dengan nilai pasaran terbuka yang dikatakan berjumlah RM28.707j. Tambahan pula terdapat dua jaminan yang diperuntukkan oleh defendan pertama dan kedua, satu gerenti korporat dan satu jaminan peribadi. Dua pengarah defendan pertama telah menyempurnakan jaminan korporat itu manakala defendan kedua dalam kapasiti peribadinya telah menyempurnakan jaminan peribadi itu. Pembelaan defendan adalah pinjaman yang diberikan oleh plaintif bertentangan dengan s 50(1) dan (4) Akta kerana tidak ada kebenaran daripada Bank Negara untuk plaintif memberikan pinjaman itu dan tambahan pula cagaran yang diambil daripada peminjam adalah tidak mencukupi. Defendan-defendan mempertikaikan kesahan jaminan-jaminan tersebut atas alasan bahawa mereka bukan 'prescribed persons' di bawah s 50(4) Akta dan bahawa jaminan-jaminan oleh mereka tidak sah. Defendan-defendan seterusnya menghujahkan bahawa jaminan-jaminan tersebut yang merupakan kontrak adalah tidak sah di bawah s 24(a) dan (b) Akta Kontrak 1950 ('AK'), kerana merupakan kontrak yang dilarang oleh undang-undang atau kontrak yang bersifat sedemikian dan, jika dibenarkan, akan menyangkal mana-mana undang-undang. Plaintif, sebaliknya, menghujahkan bahawa tujuan s 50 Akta adalah untuk menambahkan perbezaan kemampuan bayar syarikat insurans bagi tujuan memberikan lebih perlindungan kepada pemegang insurans dan ia adalah jelas di bawah s 50 Akta, yang syarikat insurans tidak memerlukan kelulusan tertentu daripada Bank Negara berkaitan setiap pinjaman yang diberikannya dengan syarat pinjaman itu dijamin atau dicagarkan sepenuhnya. Oleh itu jaminan-jaminan yang diambil oleh plaintif dalam kes ini adalah tambahan kepada harta tak alih yang telahpun diambil sebagai cagaran oleh peminjam. Oleh itu, plaintif menghujahkan jaminan-jaminan yang diambil oleh plaintif tidak tertakluk kepada s 50 Akta dan memandangkan mereka tidak dihalang di bawah Akta tidak ada persoalan yang mereka telah menyalahi undang-undang di bawah s 24 AK.

**Diputuskan**, memberikan penghakiman kepada plaintif:

(1) Seksyen 50 Akta tidak menyatakan tentang hak dan kewajipan sivil pihak-pihak berkaitan kontrak yang dimasuki yang bertentangan dengan peruntukan ini. Ia hanya melarang syarikat insurans berlesen

daripada memberikan pinjaman yang tidak dijamin sepenuhnya oleh mereka yang telah ditetapkan. Oleh itu pertikaian dalam prosiding ini boleh diselesaikan dengan menentukan sama ada surat jaminan peribadi dan indemniti apabila diuji di bawah s 24 AK 1950 adalah: (a) dihalang oleh statut; (b) bersifat sedemikian yang akan disangkal di bawah mana-mana undang-undang; atau (e) dianggap sebagai tidak bermoral atau menentang polisi awam oleh mahkamah (lihat perenggan 22–23).

(2) Tujuan s 50 Akta adalah, 'to regulate the insurance companies to make sure that the policyholders' funds are secure because the insurers deal with public funds and therefore the legislation imposes restrictions on the investment uses of the funds'. Adalah jelas yang meskipun kemudahan kredit yang diberikan oleh syarikat insurans plaintif, yang tidak dijamin oleh orang yang telah ditetapkan, boleh terkeluar daripada kategori statut yang dilarang oleh statut untuk menjadikannya tidak sah di bawah s 24(1) AK. Seksyen 50 tidak bermaksud untuk mengawal penjamin yang sebaliknya akan melindungi wang pemegang polisi melalui jaminan yang diberikannya. Jaminan yang diberikan defendan adalah berbeza dengan kontrak lain yang memberikan pinjaman kepada syarikat. Ia datang daripada pertimbangan lain di mana ia telah diberikan 'unconditionally guarantee the repayment' untuk semua jumlah wang yang tertunggak. Oleh itu meskipun kontrak atas pinjaman itu sendiri adalah tidak sah atau tidak boleh dikuatkuasakan, jaminan tersebut boleh berdiri dengan sendirinya kerana kesahannya tidak bergantung kepada pinjaman yang tidak berkuat kuasa tetapi atas pembayaran yang telahpun dibuat oleh plaintif kepada penghutang utama (lihat perenggan 28–30).

(3) Pertimbangan mahupun tujuan jaminan tersebut tidaklah bersifat sedemikian sehingga ia menyangkal s 50; ia juga bukanlah tidak bermoral atau menentang polisi awam. Pertimbangan dan tujuannya adalah mulia kerana ia memperuntukkan satu insurans untuk peluang terakhir bagi mendapat balik pinjaman (lihat perenggan 31).]

**Notes**

For cases on contravention of law, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4125–4141.

For cases on guarantee for loan facility, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3934–3936.

For cases on purposive approach, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1951–2009.

**Cases referred to**

*Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (refd)

*Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 (refd)
*Johnson & Anor v Moreton* [1978] 3 All ER 37 (refd)
*Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414 (refd)
*SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (refd)
*Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 (refd)

**Legislation referred to**
Banking and Financial Institutions Act 1989
Companies Act 1965 ss 67, 133(1), 133(5)
Contracts Act 1950 ss 24, 24(a), 24(b), 75
Insurance Act 1996 ss 2, 50(1), 50(2), 50(3), 50(4), 51, 59(1)(iv), 59(3), 65, 82(1)(a), 202
Insurance Regulations 1996 regs 47, 47(2), 50
Islamic Banking Act 1983
Offshore Banking Act 1990
Rules of the High Court 1980 O 33 r 2

*Shaikh Saleem (Felix Raj with him) (Shaikh David Raj) for the plaintiff.*
*RR Sethu (Chin Tzi Song with him) (Arifin & Partners) for the defendants.*

**Kang Hwee Gee J:**

**[1]** The plaintiff's claim against the first and second defendants is respectively for the enforcement of a corporate and personal guarantee for a loan granted by the plaintiff to another company ASM Development Sdn Bhd.

**[2]** The guarantee executed by the first defendant is set out in a 'corporate guarantee' dated 8 July 1997 signed on behalf of the first defendant by two directors of the first defendant, Dato' Khairuddin Abdul Rahman and David Rashid bin Ghazalli.

**[3]** The guarantee executed by the second defendant is set out in a 'Personal Guarantee' dated 8 July 1997 signed by the second defendant in his personal capacity.

**[4]** The plaintiff is a licenced insurance company governed and regulated by Insurance Act 1996. Section 50(1)–(4) of the Act provides as follows:

50 Security for credit facility

(1) No licensed insurer or licensed insurance broker, except in such

special circumstances, and in such amounts, as the Bank may approve, shall give to a person any credit facility unless the credit facility is fully guaranteed or secured against property of a value which is not less than such proportion of the credit facility as the Bank may prescribe.

Penalty: Imprisonment for three years or three million ringgit or both. Default penalty.

(2) Where at any time during the currency of a credit facility, the value of the security decreases to less than the proportion prescribed under subsection (1), the licensed insurer or licensed insurance broker shall require its borrower to provide additional security to comply with subsection (1) within ninety days or such other period as the Bank may approve.

Penalty: One million ringgit. Default penalty.

(3) Where the additional security required under subsection (2) is not provided within the specified period, the licensed insurer or licensed insurance broker shall take immediate steps to recover the outstanding credit facility.

(4) For the purpose of subsection (1), 'guaranteed' means guaranteed by a prescribed person.

Both the defendants are not 'prescribed persons' under Section 50(4) of the Insurance Act 1996 read with Regulation 50 of the Insurance Regulations 1996.

The defendants' defence is that the loan that was granted contravened Section 50(1) and (4) because —

(a) there is no approval from Bank Negara for the plaintiff to grant the loan;

(b) the security taken was inadequate;

(c) the defendants are not the prescribed persons who under Section 50(4) and Regulation 50 of the Insurance Regulations 1996 which provides as follows:

50 For the purpose of subsection 50(4) of the Act, 'prescribed person' means —

(a) any bank or merchant bank licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983;

(b) any finance company licensed under the Banking and Financial Institutions Act 1989 which has been prescribed under that Act to provide financial guarantees;

(c) any offshore bank licensed under the Offshore Banking Act 1990; or

(d) any consortium of two or more corporations under paragraphs (a) to (c).

**[5]** In the event the defendants contend that the plaintiff's claim is void for illegality.

**[6]** The parties are agreed that the plaintiff's case will stand or fall on whether s 50 had been complied with when the loan was granted.

**[7]** The parties are agreed that the above issue will finally determine the defendants' liability under the guarantee and that the quantum (assuming that the issue is decided in the plaintiff's favour) will be assessed by the Registrar which will have to include the determination of whether the interest charged by the plaintiff on the loan given to the borrower ASM Development is irrecoverable under s 75 of the Contracts Act 1950.

**[8]** Parties are agreed that this suit be conducted under O 33 r 2 of the Rules of the High Court 1980.

**[9]** The following documents are agreed:

(1) Surat Tawaran daripada Plaintif kepada ASM Development Sdn Bhd bertarikh 6.6.1997 (m/s 1–4 Ikatan Dokumen).

(2) Perjanjian Fasiliti di antara Plaintif dan ASM Development Sdn Bhd bertarikh 8.7.1997 (m/s 5–27 Ikatan Dokumen).

(3) Suratan-suratan Hakmilik dan Gadaian oleh ASM Development Sdn Bhd yang didaftarkan pada 14.7.1997 (m/s 28–51 Ikatan Dokumen).

(4) Gerenti Korporat oleh Defendan Pertama bertarikh 8.7.1997 (m/s 52–65 Ikatan Dokumen).

(5) Gerenti Individu oleh Defendan Kedua bertarikh 8.7.1997 (m/s 66–70 Ikatan Dokumen).

(6) Laporan Penilaian Hartanah untuk Lot PT 3799, Mukim Petaling, Wilayah Persekutuan disediakan oleh W.M. Malik & Kamaruzaman bertairkh 20.3.1997 (m/s 4–17 Ikatan Dokumen Tambahan Defendan-Defendan).

(7) Laporan Penilaian Hartanah untuk Lot PT 5, Seksyen 7, Pekan Sungei Besi, Wilayah Persekutuan disediakan oleh W.M. Malik & Kamaruzaman bertarikh 20.3.1997 (m/s 18–35 Ikatan Dokumen Tambahan Defendan-Defendan).

(8) Laporan Penilaian Terkini Hartanah untuk Lot Pt 3799 dan PT 5 bertarikh 27.4.1998 (m/s 36–37 Ikatan Dokumen Tambahan Defendan-Defendan).

(9) Laporan dan Penyata Akaun Plaintif bagi tahun berakhir 31.12.1998 (m/s 38–88 Ikatan Dokumen Tambahan Defendan-Defendan).

(10) Penjelasan Plaintif kepada KLSE bertarikh 29.5.2007 (m/s 92–93 Ikatan Dokumen Tambahan Defendan-Defendan).

**[10]** Note: Parties reserve the right to verify and to include letter dated 2 July 1998 from plaintiff to ASM Development Sdn Bhd at p 94 of the defendants' additional bundle and other letters and/or documents related to the said letter.

**[11]** The parties are agreed that the claims will be decided by their submission on points of law with respect to the points of facts as disclosed in the documents and as agreed above.

DATO' RR SETHU FOR THE DEFENDANTS

**[12]** The borrower ASM Development is not a party to this suit. They have entered into the facility agreement with the plaintiff on 8 July 1997 as per document plaintiff's bundle p 6. The borrower has also provided a charge over two pieces of land Lot 3799 and Lot PT75 as the primary security for the loan taken by it. Additionally there were two guarantees provided by the first and second defendants and the dispute now is on the validity of the respective guarantees as set out in full above.

**[13]** Two issues on this. The main issue is whether the guarantees by themselves are invalid and the second issue is whether the loan itself is void resulting in the guarantees being void.

**[14]** Section 50(1) of the Insurance Act 1996 provides for two situations: (i) guarantee and (ii) security. Both require compliance with certain conditions which had not been satisfied. A guarantee means 'guarantee by a prescribed person' as defined in s 2 of the Act and the term prescribed is defined in s 2 as 'prescribed by regulation published in the gazette'. Regulation 50(a) provides any bank or merchant bank licensed under the Banking and Financial Institutions Act 1989 ('BAFIA 1989') or the Islamic

Banking Act 1983; (b) any finance company licensed under BAFIA which has been prescribed under that Act to provide financial guarantees; (c) any offshore bank licensed under the Offshore Banking Act 1990; or (d) any consortium of two or more corporations under paras (a) to (c).

**[15]** It is admitted as a fact when the preliminary points were set down that the present defendants are not prescribed persons under the Act and that is why the point was set down as a preliminary point of law and we contend that these guarantees are illegal and void.

**[16]** Now see s 24 of the Contracts Act 1950. Under subsection (a) where a contract is forbidden by law or (b) the contract is of such a nature that, if permitted, it would defeat any law. So both the guarantees being themselves contracts are void under (a) and (b). The reasons: (i) the scheme of the Insurance Act 1996 is to regulate insurance companies to make sure that the policyholders' funds are secured because the insurers deal with public funds and therefore the legislation imposes restrictions on the investment use of the fund. The minister is empowered to revoke the licence of an insurance company if he is satisfied that the company is contravening or has contravened any provisions of the Act. Section 59(1)(iv) which enables Bank Negara to take action against a director or employee under s 59(3) or the minister can also assume control of the business. Section 65 empowers the minister to impose a moratorium to prohibit the insurer from carrying out business and s 82(1)(a) requires an auditor of the licensed insurer to report of any contravention of the Act and of course these breaches are punishable under the Act.

**[17]** Any such contravention renders the contracts in breach of the provision illegal and void. See *Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414 at p 421:

> This is a case where a dispute arose because of a claim by the appellant for outstanding fees and more importantly, a claim for fees which the appellant would have been entitled to if the respondent had not allegedly breached the CSA in or about 1994, by appointing another consultant to undertake the extension to the state mosque. Arising from these claims, the issue whether the appellant could provide the consultancy services arose, as the appellant admittedly is not a registered Architect, Engineer or Quantity Surveyor and had not obtained from the relevant professional regulatory bodies a permit to provide professional services as Architect, Engineer or Quantity Surveyor and whether the appellant has any cause of action, based upon breach of contract, having regard to ss 7 and 7A of all the three relevant Acts.

**[18]** A fortiori in our case we are dealing with funds of the policyholders which must be protected. See *Johnson & Anor v Moreton* [1978] 3 All ER 37 at p 41:

A The relevant principles of construction for construing s 24(1) are: (1) If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results: *Vacher & Sons Ltd v London Society of Compositors* [1913] AC
B 107 at p 121, [1911–13] All ER Rep 241 at p 248, per Lord Atkinson. (2) The courts have no power to fill in a gap in a statute, even if satisfied that it had been overlooked by the legislature and that if the legislature had been aware of the gap, the legislature would have filled it in: *Gladstone v Bower* [1960] 3 All ER 353, [1960] 2 QB 384; *Brandling v Barrington* [1827] 6 B & C 467 at p 475, per Lord Tenterden CJ.
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**[19]** And at p 55:

There are two main reasons why, in my view, the principle of law expressed in the 'quilibet' maxim is inapplicable to s 24(1). The first is the inherent limitation,
D manifested by what was said in *Graham v Ingleby and Glover* [1848] 1 Exch 651 and *National Westiminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] 1 All ER 641; [1972] AC 785, that the rule expressed in the maxim has no applicability where the matter of alleged private waiver is one in which the public has an interest. To establish a public interest in the instant case the tenant has to
E make good two propositions: first, that the public has an interest in good husbandry (or that Parliament thought so); and, secondly, that security of tenure is (or was regarded by Parliament as) conducive to good husbandry.

**[20]** Applied in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982]
F 2 MLJ 31 at p 34:

With respect, the provisions in question here are similar to those in *Johnson & Anor v Moreton* [1978] 3 All ER 37, a House of Lords decision, where at p 49 Lord Hailsham said:
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> The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line a).
>
> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an
H Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. (line d onwards).

I It would appear that only 'contracting out' in favour of the weaker party — ie the purchaser — might be countenanced by the courts.

**[21]** No room for departure or waiver in our case.

**[22]** This principle was applied in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 dealing with an enforcement of the guarantee given in breach of s 67 of the Companies Act 1965 (providing financial assistance to buy its own shares). Court held guarantee void when read with s 24(a) and (b) of Contracts Act 1950.

**[23]** In the event that the court upholds my submission on the illegality point then my further submission is that the plaintiff must refund certain payments made by the guarantors.

**[24]** Parties are agreed in any event that this point should be relevant as an issue only if the court decides in favour of the defendants.

**[25]** Counsel says that he is prepared to rest his submission on this point alone for the time being. Should the court rule against the defendants on the points submitted then he would want to address the court on two other points that is to say on the legality of the loan with respect to the co-extensive liability of the guarantors given that the liability of the principal debtor had not been established.

ENCIK SHAIKH SALEEM FOR THE PLAINTIFF

**[26]** Section 50 of the Insurance Act 1996 — purpose of this section see *Hansard* report p 108:

> Adalah dicadangkan di dalam Bahagian IV rang undang-undang supaya Bank Negara Malaysia dibenarkan untuk menetapkan menerusi peraturan-peraturan jumlah serta cara margin kesolvenan harus diselenggarakan. Dalam hubungan ini adalah dicadangkan margin kesolvenan penanggung insurans dinaikkan bagi memberi perlindungan yang lebih kepada pemunya polisi.
>
> Selain daripada itu, rang undang-undang juga memberi kuasa kepada Bank Negara Malaysia untuk mengambil tindakan tertentu ke atas penanggung insurans yang gagal atau tidak berupaya untuk memenuhi keperluan margin kesolvenan.
>
> Adalah tidak boleh dinafikan bahawa kesolvensi seorang penanggung insurans adalah secara langsung berkait dengan polisi pelaburan penanggung insurans pernah timbul suatu keadaan di mana beberapa orang penanggung dan saham syarikat tertentu yang disenaraikan atau tidak disenaraikan.
>
> Amalan ini adalah tidak sihat kerana akan menyebabkan sesuatu portfolio pelaburan penanggung insurans menjadi tidak seimbang dan akan menjejaskan kebolehannya untuk menanggung tuntutan sebenar masa hadapan yang boleh wujud di bawah kontrak yang sedia ada dan akan datang.
>
> Oleh kerana itu adalah dicadangkan supaya rang undang-undang antara lain memberi kuasa kepada Bank Negara Malaysia untuk menetapkan menerusi peraturan-peraturan, cara dan di mana aset seorang penanggung insurans itu harus

A disenggarakan serta asas penilaian aset dan liabiliti. Penanggung insurans juga dikehendaki untuk memegang aset diakui, dengan izin, admitted, yang nilainya tidak kurang daripada jumlah liabiliti kumpulan wang insurans dan margin kesolvenan.

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[27] It is clear that the purpose of s 50 is to increase the margin of solvency of the insurer in order to afford greater protection of the insured and towards this end rules and regulations can be imposed by Bank Negara. In order to ascertain whether the plaintiff in this case had gone against s 50 one must C look at s 50 itself first in order to discover whether the insurer here has breached the section. It is clear that under s 50 the insurer does not need specific approval from Bank Negara in respect of each loan it gives out provided the loan is fully guaranteed or secured against property of a value which is not less than such proportion of the credit facility of the loan as the D bank may prescribe. For the purpose of compliance with s 50 the plaintiff has the option of accepting security of immovable property or a full guarantee by the prescribed person as provided under s 50(4). In this case the plaintiff took immovable property as security and not the guarantee. The guarantee taken by the plaintiff in this case is additional to the immovable property as a means E of security. In taking property as security we have satisfied the minimum requirement of s 50. The taking of the guarantee is an additional assurance which need not affect the legality of the security of the immovable property. The loan in this case was RM20m and the securities given in this case were two first party legal charges over two pieces of a 99–year leasehold land with F 90 years lease still remaining. The first charge was granted over land No PT3799 HSD 72884 Mukim Petaling, Wilayah Persekutuan, worth RM3.862m according to the valuation conducted by WM Malik & Kamaruzaman. The other piece of land is held under No PT5 HSD 53372 Mukim Petaling, Wilayah Persekutuan, with the value of RM24.845m. The G total value of these two pieces of land (open market value) was RM28.707m. Pursuant to s 51 of the Insurance Act 1996 for the purposes of valuation of security, the value taken shall be the market value, which we have satisfied. We had also complied with the requirement of reg 47 of the Insurance H Regulations 1996 which requires a safety margin of 30% (can grant loan on 70% of the value of the land). The margin in this case is more than 30% that is to say 30.4%. In fact the subsequent valuation conducted by the same valuer after the loan was made confirmed the value of the two pieces of land.

I [28] The guarantees that were taken by the plaintiff are not subject to s 50 of the Insurance Act 1996. The guarantees were taken in furtherance of an additional security to enhance the plaintiff's security position and this is in line with Part 4 of the Act which is to ensure that insurers take a more prudent approach when giving out credit facilities so as to ensure its solvency

remains good. There is no bar in the Act itself for the plaintiff to take additional security in the form of a current guarantee once s 50 of the Act is complied with.

**[29]** To render the guarantees illegal under s 24 of the Contracts Act 1950 it must be shown that the guarantees must (a) forbidden by law; (b) it is of such a nature that if permitted would defeat any law; and (c) the court regards it as opposed to public policy. With regards to (a) the plaintiff submits that additional securities such as the guarantees are not prohibited under the Act and to make it prohibited would actually require this honourable court to interpret the section by inserting words into the Act when the Act itself does not prohibit other forms of security from being taken by the insurers. So long as the minimum requirement is met there is no bar under the Act for the insurer to enhance its security position.

REPLY BY DATO' RR SETHU

**[30]** Our position actually is that neither the land charge nor the guarantees had complied with s 50(1) of the Insurance Act 1996. There is no dispute that the object of s 50 is to protect the funds of the policyholders and should cover both the land security and the guarantees to be provided by the prescribed person. Here it is clear that they were not provided for by a prescribed person pursuant to s 50(4) read with reg 50. This fact is agreed by both parties. Both the first and second defendants in this case are not prescribed persons within the meaning of reg 50.

**[31]** Ultra vires — Regulation 47(2) having been made by the Minister is ultra vires his power under s 202 of the Insurance Act 1996 as this provision which comes within the province of the Central Bank under s 50(1) with the consent of the Minister.

**[32]** There is also non compliance with s 50(1) of the Insurance Act 1996 as it is clear that the two properties that were charged to the plaintiff were over valued and therefore were not worth 70% of their actual value as required under s 50(1). The court ought to ignore the plaintiff's submission that the lands were sufficiently secured and the value of the lands was 69.4% of the credit facility. The defendants dispute the accuracy of the valuation but for the moment the defendants are reserving their defence on this point.

FINDINGS AND DECISION

**[33]** Section 50 of the Insurance Act 1996 is silent on the civil right and obligation of parties with respect to contracts entered in contravention of the

provision therein. It merely prohibits licensed insurers from giving out loan which is not fully guaranteed by prescribed persons.

**[34]** As Edgar Joseph Jr FCJ said in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 at p 321 (quoting from *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* [1978] 139 CLR 410):

> Where a statute imposes a penalty upon the making or performance of a contract, it is question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.

**[35]** The dispute in this proceeding can be resolved by determining whether the personal letter of guarantee and indemnity comes within that category of prohibited contract as to render it void and unenforceable. In our jurisdiction this would have to be tested under s 24 of the Contracts Act 1950 to determine whether the consideration and object of the contract:

(a) is forbidden by statute, under sub-s (a);

(b) is of such a nature that, if permitted, would defeat any law under sub-s (b); and

whether the court regards it immoral, or opposed to public policy, under sub-s (e).

**[36]** In *Feyen*, the Federal Court had to decide, inter alia, whether a security provided by a company to a third party to secure a loan for its director was void and unenforceable as for having contravened s 133(1) of the Companies Act 1965. Adopting the purposive approach to interpretation of statute it was held that 'no civil consequences flowed therefrom, that is to say, no voidness or unenforceability is attached to the loan or the charge transactions, regard being had to the context and purpose of s 133(1), and especially the principle underlying s 133(5)'.

**[37]** I am not unmindful of the earlier Federal Court decision in *Chung Khiaw*, where a personal guarantee provided by a director of a company for the purpose of buying its own shares against the provision of s 67 of the Companies Act 1965 was found to have contravened s 24 of the Contracts Act 1950 and therefore irrecoverable. But the *Chung Khiaw* case does not provide an opposing precedent to the later decision in Feyen. On the contrary it provides a common modality to determine whether the consideration and object of a contract is void and unenforceable under s 24 of the Contracts Act 1950.

**[38]** They differ only in their considerations which had to be applied to peculiarities obtaining in each case. Of the two, Feyen by its more liberal purposive approach had traversed more grounds. It is true that one of the major elements that influenced its decision is sub-s (5) of s 133 of the Companies Act 1965 which provides that the contravention of s 133(1) does not prevent the company from recovering the loan that it had lent to the director. But the main consideration that appears to have influenced its decision is the effect on the well-being of the company if such a loan is not recoverable.

**[39]** The rationale of the decision is to be found in the following passage of the report at p 329:

> In our view, to admit the defence of illegality, to a commercial transaction of the present sort, would defeat a purposive interpretation of sub-ss (1) and (5) of s 133 of the Act which is designed for the protection of the company, its shareholders and creditors from unlawful dissipation of its resources.
>
> We would go further and say that to admit the defence of illegality to defeat the chargee society's application to enforce the charges by way of an order for sale, would, in the words of Mason J (as he then was) in *Yango Pastoral* (at p 428), provide 'a windfall gain' to the chargor company and others in a similar position. In consequence, such a result would impose substantial hardship upon the chargee society for, in the words of Gibbs CJ in *Yango Pastoral* (at p 415, para 1):
>
> > ... if a body corporate were unable to recover money that it has lent, it would be disabled from performing its own obligations, including those owed to its depositors. In those circumstances the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute (*Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB, at p 390); *Dalgety and New Zealand Loan Ltd v VC Imeson Pty Ltd* [1963] 63 SR (NSW) 998, at p 1004).
>
> This court will not be astute to lend its aid to enable the chargor company to take advantage of its own default or wrong by relying on its own breach to avoid the charge transactions and thereby escape its obligations thereunder, unless this is what the clear language of the statute is thought to require (see for example, *Kasumu v Baba Egbe* [1956] 3 All ER 266, pp 271I–272A).
>
> But, to apply s 133 to the present charge transactions so as to produce a result which would exempt the chargor company from the obligations incurred by it thereunder would be tantamount to applying it to commercial transactions which were free from the taint of corporate abuse which the section was designed to counter. However, we repeat, this is not a court of morals but a court of law and, if the counsel for the chargor company is correct in his contentions, he is entitled to succeed.
>
> Fortunately, in our view, sub-s (5) of s 133 enables us to hold that a breach of sub-s (1) of s 133 does not have the result contended for by counsel for the chargor company, for the reasons hereinbefore mentioned. The case of *Co-operative Central*

*Bank Bhd v Syarikat Bukit Tinggi* was, therefore, rightly decided by Mohamed Dzaiddin J (now a FCJ) in favour of the chargee, on the ground of the effect of sub-s (5) of the Act. It follows, therefore, that the case of *Che Wan* was wrongly decided.

To summarise, our conclusion is that accepting that the charge transactions did breach s 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to the loan or the charge transactions, regard being had to the context and purpose of s 133(1), and especially the principle underlying s 133(5), as explained above, which regrettably the learned judge failed to take into account or to give proper weight to, with the result that his judgment cannot stand.

**[40]** The purpose of s 50 as Dato' Sethu correctly submitted is, 'to regulate insurance companies to make sure that the policyholders' funds are secure because the insurers deal with public funds and therefore the legislation imposes restrictions on the investment uses of the funds' like s 133 of the Companies Act 1965.

**[41]** With this mischief in mind, and adopting the rationale in *Feyen* it is plain that even the credit facility that the plaintiff insurance company gave out which is not guaranteed by a 'prescribed person' may fall outside that category of contracts prohibited by statute to render it void under s 24(1) of the Contracts Act 1950 — *a fortiori* on the 'prescribed person' who provides the guarantee who in my view falls completely outside the ambit of the mischief.

**[42]** Section 50, I am convinced, is not meant to regulate the guarantor who on the contrary would be protecting the policyholders' fund by the guarantee that he provides. The guarantee that the defendants provide is distinct from the other contract granting the loan to the company. It emanates from a different consideration in that it was given to 'unconditionally guarantee the repayment to you of all sums of money which are now or shall at any time be owing to you anywhere on any account whatsoever'. Even assuming that the contract on the loan itself is void or unenforceable the legality of the guarantee can stand on its own for its validity does not depend on the unenforceability of the loan but on the disbursement that the plaintiff had already made to the principal debtor.

**[43]** Neither the consideration nor the object of the guarantee is of such a nature that would defeat s 50; nor can it conceivably be immoral or opposed to public policy. Its consideration and object is noble for they provide an insurance of last resort for the recovery of the loan.

**[44]** The plaintiff shall be entitled to judgment as prayed.

*Judgment granted to plaintiff.*

Reported by K Nesan